Supreme Court U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself
and All Other Persons Similarly Situated,
Petitioner,

v.

NATIONSBANK OF GEORGIA, N.A.
and JOHN LITZLER,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas Telford Barnhouse
Counsel of Record for Petitioner
Law Offices of Thomas T. Barnhouse
275 West Campbell Road, Suite 201
Richardson, Texas 75080-3560
(972) 231-0472 - Fax (972) 231-4286

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QUESTIONS PRESENTED

1. Whether an existing plan is essential to federal jurisdiction under ERSIA Coverage, 29 U.S.C. §1003(a)(1)?

2. Whether, in affirming the district court's federal jurisdiction under ERISA, the court of appeals decision that there is no "existing plan" should be instead a decision that "there is no federal jurisdiction," and thus not be in conflict with decisions of other courts of appeals that existence of a plan is essential to federal jurisdiction under ERISA Coverage, 29 U.S.C. §1003(a)(1)?

3. If there is federal jurisdiction under ERISA Coverage over a plan when there is no "existing plan," whether a participant, in a plan that failed to distribute plan assets as promised and due plan participants, is empowered to sue fiduciaries on behalf of the plan for losses to the plan resulting from fiduciary breach, as monetary damages, monetary equitable relief or monetary remedial relief, under ERISA, 29 U.S.C. §1104, §1109(a) and §1132(a)(2)?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself and All Other Persons Similarly Situated, *Petitioner,*

v.

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER, *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

Rebecca J. Brown, on behalf of herself and all other persons similarly situated, respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

DECISIONS BELOW

The decision of the court of appeals (App., *infra*, 2a-5a) is unreported. The decisions of the district court (App., *infra*,6a-24a) are unreported.

JURISDICTION

The court of appeals entered its decision on October 6, 1998 and denied Petitioner's petition for rehearing on December 18, 1998 (App., *infra*, 1a-5a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1). (App., *Infra*, 25a)

STATUTORY PROVISIONS INVOLVED

Federal jurisdiction over employee pension benefit plans is governed by coverage of the federal Employee Retirement Income Security Act of 1974 (ERISA) §3(2)(A) and (3) and §4(a)(1) [29 U.S.C. §1002(2)(A) and (3) and §1003(a)(1)]. Preemption of state law is governed by the Act's §514(a) [29 U.S.C. §1144(a)]. Plan participants' suits on behalf of the plan are governed by the Act's §404, §409(a) and §502(a)(2) [29 U.S.C. §1104, §1109(a) and §1132(a)(2)]. (App., *infra*, 26a-28a)

STATEMENT

A. Facts Material to Questions Presented

The petitioner Rebecca J. Brown (Brown) was an employee of Wyatt Cafeterias, Inc. (company) that was headquartered in Dallas, Texas. In 1988, the company operated approximately 124 cafeterias in the southwest. Brown was one participant of approximately 5,000 participants in the Wyatt Cafeterias, Inc. Employees Stock Ownership Plan (plan or ESOP). The plan was established or maintained by the company under ERISA Coverage §4(a)(1), 29 U.S.C. §1003(a)(1) (App., *infra*, 26a), during the time from 1988 to 1995. The purpose of the plan was to provide participants with company stock to be worth as much as $150.00 per share within fifteen years, as additional or deferred compensation at the time of retirement.

In 1988, the respondents as trustees of the plan, in a leveraged acquisition, paid $78.13 per share for the legal title to the 2,000,000 shares of the company's voting corporate stock that was appraised at $84.00 per share. Through the respondents' fraud in deliberate mismanagement in the operation of the company, the company stock as the only asset in the plan became totally worthless in 1995.

Brown did not receive the plan distribution of company stock promised and due her, because of the bankruptcy of the company and the termination of the plan without assets effective December 31, 1995. The plan failed as a result of respondents' fraud in deliberate mismanagement of the company as its controlling shareholder. Respondents took unconscionable gain of evading liability for a financial obligation in excess of $150,000,000.00, and unconscionable gain of fees paid them for services that went unperformed.

The plan was a defined contribution plan that was not subject to the termination provisions of ERISA for defined benefit plans. Brown filed suit in Texas state court, after the plan was terminated and no longer existing under ERISA Coverage §4(a)(1),

29 U.S.C. §1003(a)(1) (App., *infra*, 26a), on August 9, 1996, seeking to recover the loss in the company's corporate stock based on state common law fraud, which is not related to, connected to, and which has no reference to, an existing employee benefit plan or to the regulation of existing employee benefit plans, against the respondents who held the legal title to the corporate voting stock of the company as the controlling shareholder and the entity responsible for the common law fraud in deliberate mismanagement of company assets.

B. Proceedings Below

Respondents removed this case from the Texas state court to federal court pursuant to 28 U.S.C. §1446(a) (App., *Infra*, 25a) on September 17, 1996 when there was no ERISA existing plan. The district court denied Brown's motion to remand in its decision September 11, 1997, deciding that Brown's:

> "... allegations require the court to examine and interpret the language of the instruments creating this ERISA-governed ESOP, the operation of the ESOP, and any communications made by the defendants to Brown concerning the terms of the ESOP" (App., *infra*, 23a) and that "removal is proper based on ERISA preemption of Brown's fraudulent inducement claim." (App., *infra*, 24a)

None of the district court's decisions refer to a state law being preempted, or to an examination and interpretation of the language of the instruments relating to operation and communications, such as respondents' failure to obtain and report annual valuations of the company stock, and similar failures to comply with obligations in the communications and operation of the company. (App., *infra*, 6a-24a)

The district court's decision October 1, 1997 granted respondents' motion to dismiss Brown's state law claim for compensatory and punitive damages, but denied the motion to

dismiss equitable relief, directing the parties to file further briefs on the availability of equitable relief under ERISA. (App., *infra,* 14a)

After respondents filed their further brief, Brown filed her response in the form of a motion for leave to file a first amended complaint to specify claims under ERISA.

When the respondents filed a motion to strike Brown's motion to amend, Brown filed her first amended complaint December 5, 1997 as a matter of right (because the respondents had not filed an answer), setting forth, among other alternative counts, Count II on behalf of the plan as a whole for losses to the plan resulting from fiduciary breach under ERISA §404, §409(a) and §502(a)(2) [29 U.S.C. §1104, §1109(a) and §1132(a)(2)]. (App., *infra*, 27a-28a)

The district court's decision two business days later on December 9, 1997 granted respondents' alternative motion for summary judgment on Brown's state law claims, against Brown's first amended complaint, by deciding her claims, including her claim on behalf of the plan, were for monetary damages not available under ERISA. (App., *infra*, 6a - 11a)

Brown timely appealed this decision to the United States Court of Appeals for the Fifth Circuit. After the case was submitted to the court of appeals on the briefs of the parties, the court of appeals filed its summary calendar decision October 6, 1998 affirming the decision of the district court, and among other things, deciding that there is no "existing plan" on behalf of which Brown could make a claim for losses to the plan resulting from fiduciary breach under ERISA §409(a), and further, that such losses were monetary damages not available to the plan under ERISA §502(a). (App., *infra*, 4a)

The court of appeals denied Brown's petition for rehearing in its order filed December 18, 1998. (App., *infra*, 1a)

REASONS FOR GRANTING THE PETITION

Conflicting decisions on the questions presented continue in the district courts and the different courts of appeals, and the need

for more guidance from the Court is clear and present. This case is a timely opportunity to provide that guidance, because there are procedural reasons, such as, time constraints, why few of the district court and the courts of appeals decisions receive appellate review. Generally, employees as working individuals have inadequate financial resources to pursue appellate review to obtain the protection the law should afford them. These factors combine to make appellate review of decisions on the issues limited in comparison to the number of lower court decisions on the issues. In addition, the decision below is erroneous, but the issues the decision addresses are important to the national public interest.

I. Conflict with Other Courts of Appeals on Jurisdiction

The decision of the court of appeals for the fifth circuit in this case affirming the district court's federal jurisdiction under ERISA when deciding there is no "existing plan" (App., *infra*, 4a) conflicts with decisions of other courts of appeals.

The court of appeals for the eleventh circuit has provided the leading case on federal jurisdiction based on ERISA coverage of an "existing plan" in *Donovan v. Dillingham*, 688 F.2d 1367, 1370, 1373 (11th Cir. 1982) (*en banc*):

> ". . . ERISA applies to any 'employee benefit plan' if it is established or maintained by any employer . . . engaged in commerce . . . ." and "In determining whether a plan . . . is a reality a court must determine whether from the surrounding circumstances a reasonable person could ascertain the intended benefits, beneficiaries, source of financing, and procedures for receiving benefits."

None of these conditions determining "a plan is a reality" existed at the time of removal in the case at bar. Under the *Donovan* test there clearly was no "existing plan" in the case at bar at the time of removal, confirming that the part of the court of appeals decision that there is no "existing plan" is correct and not erroneous.

The *Donovan* case and similar cases in some of the other courts of appeals decide that if there is no "existing plan," the case is not covered by ERISA, there is no federal jurisdiction, and the case must be dismissed or remanded to state court upon removal. See *UIU Severance Pay Trust Fund v. Local Union No. 18-U*, 998 F.2d 509, 510, Note 2 (7th Cir. 1993); (existence of ERISA-governed plan is an essential precursor to federal jurisdiction). See also *Bongiorno v. Associates in Adolescent Psychiatry, S.C.*, 17 Emp. Benefits Cas. (BNA) 1847 (N.D. Ill. 1993); (existence of a benefit plan as that term is defined in ERISA is a jurisdictional requirement).

See also *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §1.01 and §1.01A, pp. 1-3 to 1-6.

A plan that existed at a time other than at the time of removal, such as, the antecedent plan in the case at bar, is not an "existing plan" conferring federal jurisdiction. See *Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325, 1333 (11th Cir. 1998):

> ". . . no ERISA plan existed at the time of removal, and further, that retroactive application of the subsequently adopted ERISA plan would be inappropriate in this case, the preemption doctrine does not apply, federal jurisdiction cannot be found, and the district court's summary judgment was a nullity."

Under *Whitt*, in the case at bar, no ERISA plan existed at the time of removal, there was no federal jurisdiction and the district court's summary judgment was a nullity.

The Court should grant Brown's petition to resolve this conflict in the courts of appeal and correct the error of the court of appeals for the fifth circuit.

II. Conflict with Other Courts of Appeals on Losses to Plans

If there is federal jurisdiction under ERISA Coverage over

a failed plan when it is not an "existing plan," the failed plan in this case must be an ERISA entity. The district court's jurisdiction over this case must be predicated on the failed plan being an entity in this case as an "ERISA-governed ESOP," described in the district court's September 11, 1997 decision. (App., *infra*, 23a) If the respondents are covered by ERISA, then, the failed plan must be covered by the provisions of ERISA, and the failed plan is an entity upon which a participant may sue on behalf of, in the same manner that respondents as trustees and the petitioner as a plan participant were construed as ERISA entities by the district court. Under ERISA §502(d)(1), 29 U.S.C. 1132(d)(1), (App., *infra*, 28a), a plan is an entity and service upon a trustee constitutes service upon the plan. ERISA Coverage must be over a plan that is an ERISA entity.

The decision of the court of appeals for the fifth circuit affirming the district court's grant of summary judgment against Brown, then, conflicts with decisions of other courts of appeals, by deciding, first, the failed plan no longer existed and, second, that Brown sought monetary damages on behalf of the plan that had failed, and that monetary damages are not available to the plan under ERISA. (App., *infra*, 4a)

Interestingly, the court of appeals decision misquotes *Sanson v. General Motors*, 966 F.2d 618 (11th Cir. 1992) as being about a claim on behalf of a plan. *Sanson* is about a claim of recovery for only one individual and preemption of Georgia state law, and not about a claim on behalf of a plan. (App., *infra*, 4a)

The following cases decided that a plan that failed can recover losses to the plan from fiduciary breach as monetary damages, monetary equitable relief or monetary remedial relief (to remedy a wrong or loss) under ERISA §409(a), 29 U.S.C. 1109(a) (App., *infra*, 27a-28a):

Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 147, 105 S.Ct. 3085, 3092-93, 87 L.Ed.2d 96 (1985);(monetary damages relief authorized under ERISA §409(a) is not available to an individual recovery that is not a recovery for the plan as a whole, but monetary damages is available on behalf of the plan as a whole, and arises for violations of fiduciary general duties under ERISA §404, such as, mismanagement of plan assets).

Fink v. National Sav. And Trust Co., 772 F.2d 951 (D.C. Cir. 1985); (trustees failure to investigate and evaluate investments would be grounds for recovery of trustees fees paid for services that went unperformed, Judge Scalia at 962).

Mertens v. Black, 948 F.2d 1105 (9th Cir. 1991); (participants in failed Kaiser Steel Retirement Plan were empowered to sue fiduciaries for fiduciary breach to recover loss suffered by the plan as a whole under ERISA Sections 1109 and 1132(a)(2)).

Martin v. Feilen, 965 F.2d 660,671,672 (8th Cir. 1992) *cert. denied*, 506 U.S. 1054 (1993); (ERISA §409(a) may "restore plan participants to the position in which they occupied but for the breach of trust" where sponsoring employer's stock, as the only ESOP asset, became worthless).

*Barker v. American Mobil Power Corp.*64 F.3d 1397, 1404 (9th Cir. 1995):

> ". . . the fact that no funds were available to pay the participants, who had been assured of the existence of those funds, was probative evidence that the funds were not properly maintained."

Roth v. Sawyer-Cleator Lumber Co., 61 F.3d 599, 601,602 (8th Cir. 1995); (monetary loss is recoverable for ESOP whose assets became worthless).

Kayes v. Pacific Lumber Co., 51 F.3d 1449, 1455, 1462 (9th Cir. 1995); (participants can sue under Section 1132(a)(2) on behalf of plan that failed as beneficiaries to enforce the right of the plan against fiduciaries to properly seek damages for the plan and class certification under Rule 23(a)(3)).

See also *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §3.05 C, p. 3-104:

> "monetary damages for breach of fiduciary duty is provided within ERISA §409(a) . . ." and "Because ERISA does not define 'loss,' courts look to common law principles and remedies under trust law in determining the measurement of damages."

The Court should grant Brown's petition to resolve this conflict in the courts of appeal and correct the error of the court of appeals for the fifth circuit.

III. The Court of Appeals Decision is Erroneous

The decision of the court of appeals for the fifth circuit in this case affirming the decision of the district court is erroneous because statutory language is clear that the district court had no federal jurisdiction. Further, if there is federal jurisdiction over the failed plan when it is not an "existing plan," the failed plan is an entity in this case. Brown as a plan participant was empowered to sue on behalf of the plan that failed, as a entity in this case, for losses to plan assets from fiduciary breach, as monetary damages, monetary equitable relief or monetary remedial relief.

When courts interpret statutes, the initial inquiry is the language of the statute itself. See *United States v. James*, 478 U.S. 597, 604, 106 S.Ct. 3116, 3120, 92 L.Ed.2d 483 (1986); *United States v. Barlow*, 41 F.3d 935, 942 (5th Cir. 1994) *cert. denied*, ____ U.S. ____, 115 S.Ct. 1389, 131 L.Ed. 2d 241 (1995).

The clear language of the statute confers no federal jurisdiction in this case, because of the unambiguous present tense in ERISA Coverage §4(a)(1), 29 U.S.C. §1003(a)(1), describing coverage of the act as being over any plan that "is" currently established or maintained by an employer in commerce, and not otherwise. (App., *infra*, 26a) At the time of removal in this case, there was no employer establishing or maintaining an "existing plan." Clearly when there is no "existing plan" there is no coverage by ERISA, there is no plan to "relate to" under the ERISA preemption of §514(a), 29 U.S. §1144(a) and there is no federal jurisdiction. (App., *infra*, 28a)

Even if there were an "existing plan," Texas state common law fraud does not relate to a plan because it does not regulate employee benefit plans, and an "existing plan" is not essential to invoke state common law fraud. See *California Division of Labor Standards Enforcement et al. v. Dillingham Construction, N.A., Inc.*,

et al., *infra*, 12. See also *Butler v. Polk*, 592 F.2d 1293, 1296 (5th Cir. 1979); (It is axiomatic that ambiguities are generally construed against removal).

If there is federal jurisdiction under ERISA Coverage over a failed plan when it is not an "existing plan," the failed plan in this case must be an ERISA entity. The district court's jurisdiction over this case must be predicated on the failed plan being an entity in this case as an "ERISA-governed ESOP," described in the district court's September 11, 1997 decision. (App., *infra*, 23a) If the respondents are covered by ERISA, then, the failed plan must be covered by the provisions of ERISA, and the failed plan is an entity upon which a participant may sue on behalf of, in the same manner that respondents as trustees and the petitioner as a plan participant were construed as ERISA entities by the district court. Under ERISA §502(d)(1), 29 U.S.C. 1132(d)(1), (App., *infra*, 28a), a plan is an entity and service upon a trustee constitutes service upon the plan. ERISA Coverage must be over a plan that is an ERISA entity.

The clear language of the statute in ERISA §502(a)(2), 29 U.S.C. §1132(a)(2), referring to ERISA §409(a), 29 U.S.C. 1109(a), containing the words "make good to [the] plan any losses," mean that a plan participant is empowered to sue fiduciaries on behalf of the plan that failed, for losses from fiduciary breach, as monetary damages, monetary equitable relief or monetary remedial relief. (App., *infra*, 28a-28a) Losses in plan assets are monetary. The meaning of the word "losses" in the statute has the same monetary meaning as the accounting term "Profit and Loss" has monetary meaning. The meaning is the same whether designated "losses," "monetary damages," "monetary equitable relief" or "monetary remedial relief." The meaning of the statute is confirmed by case law authorities. See "II. Conflict with other Courts of Appeals on Losses to Plans," *supra*, 6.

See also the conclusion in the district court's December 9, 1998 decision that Brown's ". . . claim is one for damages if it seeks monetary relief for losses an ERISA plan sustained as a result of an alleged breach of fiduciary duties." (App. *Infra*, 9a) This conclusion adopts the ERISA statutory meaning of the term "losses" to a plan as "damages," and should have permitted Brown's claim for these

losses on behalf of the plan to go to trial.

The decision of the court of appeals that the "Supreme Court has held that monetary damages (i.e., legal relief) are not available under ERISA §502(a)'s carefully crafted civil enforcement" (App., *infra*, 4a) contradicts the Court's decision in *Russell, supra* 7, is a contradiction of the language in ERISA §409(a) and §502(a)(2),29 U.S.C. §1109(a) and §1132(a)(2), and is patently incorrect and erroneous. Congressional intent clearly is that fiduciaries are to make good any losses to plan assets resulting from fiduciary mismanagement of plan assets, in terms of monetary damages, monetary equitable relief or monetary remedial relief. See Note 8 in *Russell.*

See also *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §3.05 C, p. 3-104:

> "monetary damages for breach of fiduciary duty is provided within ERISA §409(a) . . ." and "Because ERISA does not define 'loss,' courts look to common law principles and remedies under trust law in determining the measurement of damages."

The decision of the court of appeals affirming the district court's federal jurisdiction and summary judgment for respondents should be reversed, and this case remanded to the district court for remand to the Texas state court, or, in the alternative, for trial on the merits.

IV. The Questions Presented are Important to the National Public Interest

With the current proliferation of business mergers and acquisitions, and attendant business failures resulting from mismanagement of assets, literally hundreds of thousands of employees are involved and subject to dislocation. Large numbers of employees subject to dislocation is a matter of grave national public interest. The acquisition or merger of Exxon and Mobil is a prime

example. Houlihan Lokey's Mergerstat, reports 7,758 mergers or acquisitions in 1998 compared to 3,510 in 1995, according to the article "Mergers may hurt firms, experts say," in *The Dallas Morning News*, January 10, 1999, p. 1 and p. 19A. More and more questions similar to the questions presented will arise about ERISA plans, ERISA coverage, ERISA federal jurisdiction, ERISA peemption of state law and ERISA relief.

In *California Division of Labor Standards Enforcement et al. v. Dillingham Construction, N.A., Inc., et al.*, 117 S.Ct. 832, _____ (1997), Justice Scalia and Justice Ginsburg noted in a separate opinion that the Court has decided:

> "no less than 14 cases to resolve conflicts in the Courts of Appeals regarding ERISA peemption of various sorts of state law with two more ERISA peemption cases so far this term."

The Court's decisions have not been as effective and definitive as the Court could have wanted them to be. The justices suggest that the federal courts have gone too far in accepting the curbstone philosopher's "everything is related to everything else." They further suggest that the Court do more to clarify that the "relate to" clause is meant to identify state laws regulating employee benefit plans. In many cases, often in spite of dissenting opinion, the federal lower courts have not made the interpretation of a "sensible person" as intended by the law and the Court.

Congressional intent was for exclusive federal regulation of employee benefit plans, so that only state laws regulating employee benefit plans are to be preempted. See *Handbook on ERISA Litigation*, Second Edition, Aspen Law and Business, Division of Aspen Publishers, Inc., 1994, 1999 Supp., §2.03, p. 2-5, Note 19:

> "U. S. Representative Dent, who sponsored ERISA in the House, referred to ERISA's preemption provisions as follows: 'Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate... employee benefit plans...round[ing] out the protection afforded participants . . . . '

> According to Senator Williams, also an ERISA sponsor, the preemption provisions were 'intended to preempt the field for Federal regulations . . . .'" (Emphasis added)

Many lower court decisions are so overly focused on variable meanings of "relate to," "connected with" or "reference to" preemption of state law, and endless, irrelevant misapplications of meanings for "plan," "damages," "legal relief," "equitable relief," "remedial relief" and "monetary relief" that even the most obvious fundamentals of federal jurisdiction, preemption, damages, legal relief, equitable relief, remedial relief and monetary relief, are inadvertently or otherwise overshadowed and ignored.

In line with the suggestion of Justice Scalia and Justice Ginsburg, the case at bar may be a rare opportunity for the Court to do more to clarify an ERISA plan, ERISA coverage, ERISA federal jurisdiction, ERISA peemption of state law and ERISA relief. Such clarity would result in the federal lower courts adopting a clearer, more consistent and predictable interpretation of ERISA for protection afforded employees, that a "sensible person" can understand, honor and accept, as the law and the Court intended. The Court, therefore, should grant the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas Telford Barnhouse
Counsel of Record for Petitioner
Law Offices of Thomas T. Barnhouse
275 West Campbell Road, Suite 201
Richardson, Texas 75080-3560
(972) 231-0472 - Fax (972) 231-4286

APPENDIX A.

U.S. COURT OF APPEALS
FILED
DEC 18 1998
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 98-10034

REBECCA J BROWN, On Behalf of Herself and All Other Persons Similarly Situated

Plaintiff - Appellant

v.

NATIONSBANK OF GEORGIA NA; JOHN LITZLER

Defendants - Appellees

Appeal from the United States District Court for the Northern District of Texas, Dallas

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ON PETITION FOR REHEARING

Before DAVIS, DUHÉ and PARKER, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

ENTERED FOR THE COURT:

s/ Robert M. Parker
United States Circuit Judge

REHG-2

APPENDIX B.

U.S. COURT OF APPEALS
FILED
OCT 06 1998
CHARLES R. FULBRUGE III
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 98-10034

Summary Calendar

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff-Appellant,

VERSUS

NATIONSBANK OF GEORGIA, NA; and JOHN LITZLER,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas
(3:96-CV-2630-G)

Before DAVIS, DUHÉ, and PARKER, Circuit Judges.

PER CURIAM:*

Appellant Rebecca J. Brown ("Brown") appeals from the district court's grant of summary judgment in favor of Defendants/Appellees, Nationsbank of Georgia ("Nationsbank") and John Litzler ("Litzler"). Her claims stem from the termination of a retirement plan of which the appellees were trustees. Finding no reversible error, we affirm.

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I. Background and Procedural History

Brown was an employee of Wyatt Cafeterias, Inc. and had accumulated benefits pursuant to Wyatt's employee stock ownership plan ("the ESOP"). Under the ESOP, employees were allocated Wyatt stock based on company contributions to the ESOP and the employees' salaries. During appellees term as trustees for the ESOP, Wyatt stock dropped from around $84.00 per share to virtual worthlessness. Once the stock became worthless, the ESOP was left with no assets and was therefore terminated. Appellant brought this action individually and on behalf of other beneficiaries of the ESOP, alleging that the appellees had committed fraud and breached their fiduciary duties as trustees of the ESOP.

Originally filed in state court as a state-law fraud cause of action, the appellees removed the case to federal district court based on ERISA preemption. At the district court, appellees then filed motions to dismiss or, in the alternative, for summary judgment. The court granted appellees motion to dismiss Brown's claims for compensatory and punitive damages for failure to state a claim on which relief could be granted under ERISA. However, because neither party had squarely addressed the availability of equitable relief, the court withheld ruling on appellees, motions until the parties had briefed that issue Appellees submitted their brief as directed, but Brown instead filed a motion for leave to amend her complaint. Before the court could rule on Brown's motion for leave, Brown filed her amended complaint and amended motion for class certification. Brown maintained that leave of court was not required if the appellees hadn't yet filed a responsive pleading. After the deadline to respond to appellees brief had passed, the court granted appellees motion for summary judgment.

II. Discussion

After reviewing the record before us and the applicable law, we conclude that the district court's granting of summary judgment on behalf of the Defendants/Appellees should be affirmed.

Summary judgment is appropriate when the summary judgment record demonstrates "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a

matter of law." FED. R. Civ. P. 5 6 (c) In reviewing the district court's grant of summary judgment, we apply a de novo standard of review. See Rodriquez v. Pacificare of Texas, Inc., 980 F.2d 1014, 1019 (5th Cir. 1993).

Brown asserts that the district court erred in classifying the claims in her amended complaint as legal rather than equitable relief. "Equitable relief" under ERISA includes "those categories of relief which were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993). Regardless of the language used to characterize a claim, the claim is one for damages if it seeks monetary relief for losses an ERISA plan sustained as a result of an alleged breach of fiduciary duties. See Id. at 255; see also, Weir v. Federal Asset Disposition Assn., 123 F.3d 281, 290-91 (5th Cir. 1997). Accordingly, we agree with the district court's conclusion that Brown has simply tried to re-characterize an obvious claim for damages in the language of equity.

Next, Brown asserts that the district court erred in ruling that her claims did not set forth permissive relief under ERISA. Specifically, she argues that monetary damages relief is available to an ERISA plan, based on Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) (holding that extra- contractual or punitive damages are not available to a beneficiary of an ERISA plan, but declining to rule on whether they would be available on behalf of the plan itself). This argument fails for two reasons. First, there is no longer a plan for which Brown would be able to recover "on behalf of," under ERISA §409 (a) , as she is no longer a participant in an existing plan. *See* Sanson v. General Motors, 966 F.2d 618, 621 (11th Cir. 1992)(noting that individuals that lose their status as a participant or beneficiary of a plan can no longer recover on behalf of the plan). Second, the Supreme Court has held that monetary damages (i.e., legal relief) are not available under ERISA §502(a)'s carefully crafted civil enforcement provisions. *See* Mertens, 508 U.S. at 255 (holding that compensatory damages--monetary relief for losses a plan sustained as a result of an alleged breach of fiduciary duties--were the classic form of legal relief). Because it is clear that Brown is seeking precisely the same classic form of legal

relief referred to in Mertens, and not equitable relief such as restitution or injunction, the district court correctly ruled that Brown's claims did not set forth permissive relief under ERISA.

In Brown's final point of error, she asserts that the district court erred in granting summary judgment without affording her the opportunity to amend pursuant to Fed. R. Civ. P. 15. Brown' s basis for this argument is that neither of the appellees had filed a responsive pleading prior to the filing of her amended complaint. While Brown is correct that neither a motion to dismiss nor a motion for summary judgment constitutes a responsive pleading such to extinguish a plaintiff's right to amend a complaint, see Zaidi v. Ehrlich, 732 F.2d 1218, 1219-20 (5th Cir. 1984), this does not afford her relief in this case.

It is clear from our review that the district court specifically considered the claims in Brown's amended complaint when granting appellees, motion for summary judgment. Having thus been allowed to fully present her arguments to the court, it would serve no valid purpose to allow Brown another attempt in vain to further cloak her original damages claims into the language of equity.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED DEC 9 1997
Nancy Doherty, Clerk
Entered on Docket
Dec 10 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,
Plaintiff,

VS.

NATIONSBANK OF GEORGIA, N.A., and JOHN LITZLER,
Defendants.

CIVIL ACTION NO.

3:96-CV-2630-G

MEMORANDUM ORDER

Before the court is the supplemental brief of the defendants, NationsBank of Georgia, N.A. and John Litzler (collectively, "defendants"), on their alternative motion for summary judgment. For the following reasons, the defendants' alternative motion for summary judgment is granted.

I. BACKGROUND

This court's memorandum order of September 11, 1997 ("Preemption Order"), denying Brown's motion to remand, contains a detailed discussion of the facts of this case. That discussion is incorporated here by reference.

By a memorandum order dated October 1, 1997 ("Damages Order"), the court granted the defendants' motion to dismiss Brown's claims for compensatory and punitive damages. By the same order, the court denied the defendants' motion to dismiss Brown's claims for equitable relief. The court withheld ruling on the defendants' alternative motion for summary judgment, concluding that the motion was premature. Because neither party had squarely addressed the availability of equitable remedies, the court reserved decision and directed the parties to submit briefs addressing this issue. The defendants submitted their brief as directed on October 21, 1997. Instead of responding to this brief, however, Brown filed a motion for leave to amend her complaint and to amend her motion for class certification. Before the court could rule on Brown's motion for leave, Brown filed her amended complaint and amended motion for class certification.[1] The time to respond to the defendants' brief under this court's local rules has now passed.

II. ANALYSIS

A. Evidentiary Burdens on a Motion for Summary Judgment

Summary judgment is proper when the pleadings and evidence on file show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. 56(c). A movant for summary judgment makes such a showing by informing the court of the basis of its motion and by identifying the portions of the record which reveal there are no genuine material fact issues to support the nonmovant's case. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323 (1986). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty*

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[1] The circuit has generally not approved the amendment of pleadings to avoid a pending motion for summary judgment. See *Little v. Liquid Air Corporation*, 952 F.2d 841, 846 n.2 (5th Cir. 1992) and cases cited therein. This portion of the panel decision was specifically upheld by the *en banc* court. *Little v. Liquid Air Corporation*, 37 F.3d 1069, 1074 n.8 (5th Cir. 1994) *(en banc)*.

Lobby, Inc., 477 U.S. 242, 248 (1986).

Once the movant makes this showing, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 324. To carry this burden, the nonmovant must show more than some metaphysical doubt as to the material facts. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986). Rather, the nonmovant must present evidence sufficient to support a resolution of the factual issues in her favor. *Anderson*, 477 U.S. at 257. The nonmovant cannot survive a motion for summary judgment by resting on the allegations in her pleadings. *Isquith for and on behalf of Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 199 (5th Cir.), *cert. denied*, 488 U.S. 926 (1988); see also *Celotex*, 477 U.S. at 324. Although the court may not enter a default summary judgment by virtue of Brown's failure to respond, it may accept as undisputed the facts so described in the defendants' brief. See *Eversley v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988).

The trial court is given wide discretion to determine the timing of a motion for summary judgment. *Elvis Presley Enterprises, Inc. v. Elvisly Yours, Inc.*, 936 F.2d 889, 893 (6th Cir. 1991); *Fontenot v. Upjohn Company*, 780 F.2d 1190, 1193-94 (5th Cir. 1986). A party may not be "railroaded" by a premature motion for summary judgment. See *Celotex*, 477 U.S. at 322, 326. But so long as the trial court affords the parties adequate notice and adequate opportunity to develop their evidence, the court need not permit any discovery before ruling on a summary judgment motion. *United States v. Bloom*, 112 F.3d 200, 205 n. 17 (5th Cir. 1997); *Washington v. Allstate Insurance Company*, 901 F.2d 1281, 1285 (5th Cir. 1990).

Brown originally brought her claims in Texas district court in August of 1996. Notice of Removal at 1. The defendants removed this case to federal court shortly thereafter. See id. The defendants filed their motion to dismiss or, in the alternative, for summary judgment in October of 1996. *See generally* Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment. In October 1997, the court granted the defendants' motion in part and denied it

in part, directing the parties to submit summary judgment briefs addressing the availability of equitable remedies. Damages Order at 5-6. The defendants' have submitted a brief as directed, but Brown has chosen not to avail herself of the opportunity to respond. In light of these facts, the court finds that the parties have received adequate notice of the motion and adequate opportunity to develop their evidence. Therefore, the defendants' motion for summary judgment is ripe for decision. See Bloom, 112 F.3d at 205 n. 17; *Washington, 901* F.2d at 1285.

B. Equitable Remedies under ERISA

Brown's claims, originally pleaded as common-law fraud, are governed exclusively by ERISA. Preemption Order at 5-8. ERISA allows certain private individuals to enforce its provisions by bringing civil actions. *See generally* 29 U.S.C. § 1132 (a).[2] Although an individual litigant may not recover at law under ERISA, *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134, 144 (1985), a court may award individual equitable relief if appropriate. *Varity Corporation v. Howe,* U.S.116 S. Ct. 1065, 1079 (1996). "Equitable relief" under ERISA includes those categories of relief that were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)."

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[2] This section states in pertinent part:

A civil action may be brought-

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief [to the plan for breach of fiduciary duty];

(3)by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan ....

29 U.S.C.1132(a).

Mertens v. Hewitt Associates, 508 U.S. 248, 256 (1993). Regardless of the language used to characterize a claim, the claim is one for damages if it seeks monetary relief for losses an ERISA plan sustained as a result of an alleged breach of fiduciary duties. Id. at 255; see also *Weir v. Federal Asset Disposition Assn.,* 123 F.3d 281, 290-91 (5th Cir. 1997).

Brown's original petition sought to recover actual and punitive damages from the defendants for an alleged breach of fiduciary duty. Plaintiff's Original Petition at 11-12, attached as exhibit A to Notice of Removal. But Brown cannot recover individual damages from the defendants. Damages Order at 4; see also *Russell,* 473 U.S. at 144. Therefore, Brown filed an amended complaint, recasting her-claims as ones for "mandatory injunctive relief to enjoin Defendants to make good the value of the ESOP (Plan)." Memorandum of Authorities in Support of Motion for Leave to File Amended Complaint and Amended Motion for Class Certification at 3. Brown now requests the imposition of a constructive trust in the amount of $156,260,000.00 -- the original purchase price of 2,000,000 shares of Wyatt Cafeterias, Inc. stock. First Amended Complaint--Class Action at 27-28.

The defendants, in their brief, argue that no equitable relief is appropriate in this case. *See generally* Defendants' Brief Addressing Availability of Equitable Remedies. The defendants note that here, unlike *Varity*, there is no existing, alternative ESOP in which to reinstate Brown. Id. at 2-3. The defendants also allege that there are no "'ill-gotten plan assets or profits"' at issue that would justify an order of restitution. Id. at 6 (quoting *Mertens,* 508 U.S. at 260). Rather, the defendants maintain, damages at law are the substance of Brown's claims, regardless of the form in which she presents them. Id. at 5.

The court agrees. First, a claim for monetary compensation by any other name is still a claim at law. *Mertens,* 508 U.S. at 255; Cf. William Shakespeare, Romeo and Juliet act 2, sc. 2 ("What's in a name? That which we call a rose By any other name would smell as sweet."). Brown's amendment is an awkward and futile attempt to cloak an obvious claim for damages in the language of equity. Second, even if Brown's request for a constructive trust stated a

claim in equity, she has failed to provide evidence of a fact issue regarding unjust enrichment, an essential element of the claim. *See* 5 Austin W. Scott, The Law of Trusts § 462.2 (1967) ("A constructive trust ... is imposed in order to prevent unjust enrichment."). Therefore, summary judgment in favor of the defendants is proper. *Celotex*, 477 U.S. at 322-23 (summary judgment proper where plaintiff fails to establish existence of essential element as to which she will bear the burden of proof at trial).

III. CONCLUSION

For the reasons stated above, the defendants' motion for summary judgment is **GRANTED.**

SO ORDERED.

December 9, 1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX D.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED DEC 9 1997
Nancy Doherty, Clerk
Entered on Docket
Dec 10 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff,

vs.

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER,

Defendants.

CIVIL ACTION NO.

3:96-CV-2630-G

JUDGMENT

This judgment is entered pursuant to F.R. Civ. P. 58 and the memorandum orders of September 11, 1997, October 1, 1997, and this date. For the reasons stated in those memorandum orders, it is **ORDERED** that the plaintiff take nothing from the defendants on her claims in this case and that the defendants recover their costs of court.

December 9, 1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX E.

IN THE UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED DEC 10 1997
Nancy Doherty, Clerk
Entered on Docket
Dec 11 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, ET AL.,
Plaintiffs,

CIVIL ACTION NO.

3:96-CV-2630-G

VS.
NATIONSBANK OF GEORGIA, N.A.
and JOHN LITZLER,
Defendants.

ORDER

Defendants' motion to strike for failure to comply with court-ordered briefing is **DENIED** as moot.

SO ORDERED.

December 9 ,1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX F.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED OCT 1 1997
Nancy Doherty, Clerk
Entered on Docket
Oct 2 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff,

vs.

CIVIL ACTION NO.

3:96-CV-2630-G

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER,

Defendants.

MEMORANDUM ORDER

Before the court is the motion of defendants NationsBank of Georgia, N.A., and John Litzler (collectively, "defendants") to dismiss or, in the alternative, for summary judgment on the claims asserted by the plaintiff Rebecca Brown ("Brown") for herself and others similarly situated. For the reasons stated below, the motion to dismiss is granted as to Brown's claims for compensatory and punitive damages but denied as to her claims for equitable relief. The court reserves decision on the motion for summary judgment, and the parties are directed to submit further briefs on the question whether equitable relief is available to Brown if she establishes that the defendants breached their fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29

U.S.C. H *1001 et seq.*

1. BACKGROUND

This court's memorandum order of September 11, 1997 ("Preemption Order"), denying Brown's motion to remand, contains a detailed discussion of the facts of this case. That discussion is incorporated here by reference.

II. ANALYSIS

A. Dismissal for Failure to State a Claim -- Rule 12(b)(6)

Fed. R. Civ. P. 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted. " A motion under Rule 12 (b) (6) should be granted only if it appears beyond doubt that the plaintiff could prove no set of facts in support of her claim that would entitle her to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Leffall v. Dallas Independent School District,* 28 F.3d 521, 524 (5th Cir. 1994) (citations omitted). The court must accept all well-pleaded facts as true and view them in the light most favorable to the non-movant. *Capital Parks, Inc. v. Southeastern Advertising and Sales System, Inc.,* 30 F.3d 627, 629 (5th Cir. 1994) (citation omitted); *Norman v. Apache Corporation,* 19 F.3d 10 17, 1021 (5th Cir. 1994) (citations omitted); Chrissy F. *by Medley v. Mississippi Department of Public Welfare,* 925 F.2d 844, 846 (5th Cir. 199 1). Thus, in deciding the defendants' motion, the court must assume the truth of Brown's allegations.

Contrary to Brown's assertion, a court may rule on dispositive motions in a putative class action prior to class certification. See, e.g., Floyd v. *Bowen,* 833 F.2d 529, 534 (5th Cir. 1987). Rule 23(e) restricts the *voluntary* dismissal or compromise of an actual or potential class action by *the parties,* not the *involuntary* dismissal of an action by *the court. Shelton v. Pargo, Inc.,* 582 F.2d 1298, 1300 n. I (4th Cir. 1978); Charles A. Wright et al., Federal Practice and Procedure § 1797 at 345-46 (1986) ("Another exception to the mandatory notice requirement in Rule 23(e) occurs when the dismissal is not voluntary."). Therefore, the court concludes that the defendants' motion to dismiss is ripe for decision.

B. ERISA Preemption

In the Preemption Order, this court held that Brown's claims, pleaded as common-law fraud, are governed exclusively by ERISA. Preemption Order at 5-8. ERISA allows certain private individuals to enforce its provisions by bringing civil actions. *See generally* 29 U.S.C. § 1132(a). This section states in part:

> A civil action may be brought–
>
> * * *
>
> (2)by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief [for breach of fiduciary duty];
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

.... Id. A private litigant may not recover individual compensatory or punitive damages under §1 132(a)(2). *Massachusetts Mutual Life Insurance Company v. Russell,* 473 U.S. 134, 144 (1985). Rather, the individual claimant must recover on behalf of the plan. 29 U.S.C. § 1109(a) (fiduciaries liable "to such plan" for damages caused by their breach); see also *Russell,* 473 U.S. at 142. However, a court may award an individual appropriate equitable relief under § 1 132(a)(3). *Varity Corporation v. Howe,* __ *U.S.* 116 S.Ct. 1065, 1079 (1996).

It is undisputed that Brown was a beneficiary under the Wyatt and Triangle ESOP and that the defendants were plan fiduciaries. Brown alleges that the defendants misrepresented the characteristics of the ESOP, thereby fraudulently inducing her to remain in the employ of Wyatt without making alternative retirement plans. Plaintiff 's Original Petition at 9- 10, attached as Exhibit A to Notice of Removal. Proof of these allegations could not entitle Brown to recover individual compensatory or punitive damages under ERISA. See *Russell,* 473 U.S. at 144. Therefore, the court

must dismiss Brown's claims for damages because she has failed to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). However, the alleged facts might, if proven, support a claim of breach of fiduciary duty entitling Brown to appropriate individual equitable relief. See *Varity*, __ U.S.__ , 116 S.Ct. at 1078. Because the facts as pled might entitle Brown to equitable relief, dismissal of her claim for relief in equity is inappropriate. See *Leffall*, 28 F.3d at 524. Summary judgment on Brown's equitable claims is also premature because neither side has squarely addressed this issue. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323-24 (1986) (requiring a movant for summary judgment to inform the court of the basis of his motion and identify the portions of the record which reveal there are no genuine issues of material fact and the nonmovant then to direct the court's attention to evidence in the record sufficient to establish a genuine issue of material fact for trial). Therefore, the court withholds decision on Brown's equitable claims pending the submission of briefs on this issue.

III. CONCLUSION

The defendants have carried their burden to show that Brown could prove no set of facts in support of her claim for individual compensatory and punitive damages that would entitle her to relief. Accordingly, the motion to dismiss the claim for compensatory and punative damages for failure to state a claim is **GRANTED.** The defendants have not carried their burden, however, as to Brown's claim for equitable relief. Therefore, the motion to dismiss the claim for equitable relief is **DENIED.**

SO ORDERED.

October 1, 1997.

s/ A. Joe Fish
A. JOE FISH
United States District Judge

APPENDIX G.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

U.S. District Court
Northern District of Texas
FILED SEP 11 1997
Nancy Doherty, Clerk
Entered on Docket
Sep 12 1997 Pursuant
To FRCP Rules
58 and 79a

REBECCA J. BROWN, on behalf of herself and all other persons similarly situated,

Plaintiff,

VS.

NATIONSBANK OF GEORGIA, N.A., and JOHN LITZLER,

Defendants.

CIVIL ACTION NO.

3:96-CV-2630-G

MEMORANDUM ORDER

Before the court is the motion of plaintiff Rebecca J. Brown ("Brown") to remand this action to a state district court from which it was previously removed. For the following reasons, the motion is denied.

I. BACKGROUND

Brown, a resident of Dallas County, Texas, was an employee of Wyatt Cafeterias, Inc. ("Wyatt") for seventeen years. Plaintiff's Original Petition ("Petition") at 1, attached to the Notice of Removal as Exhibit A. During her employment, Brown accumulated benefits pursuant to the Wyatt Cafeterias, Inc. Employee Stock Ownership Plan ("Wyatt ESOP") and its successor program, the Triangle Foodservice Inc. Employees Stock Ownership Plan ("Triangle

ESOP") (collectively, the "ESOP").[1] Id. Under the ESOP, employees were allocated Wyatt stock based on company contributions to the ESOP and the employee's salary. Summary Plan Description at 1, attached to the Notice of Removal as Exhibit B.

Defendant NationsBank of Georgia, N.A. ("NationsBank") is a foreign corporation doing business in Texas. Petition at 2. NationsBank served as trustee of the Wyatt ESOP from January 1, 1988 to July 21, 1995. Affidavit of Ernest F. Ritter in Support of Defendants' Response ("Ritter Affidavit") ¶ 4.

Defendant John Litzler ("Litzler") is a resident of Dallas County, Texas. Petition at 3. Litzler is the successor trustee of the ESOP, and he served from July 21, 1995, until the termination of the ESOP. Ritter Affidavit ¶ 5.

While serving as trustee to the ESOP, NationsBank began closing Wyatt cafeterias. Plaintiff's Reply Brief at 2. With the closing of approximately one quarter of Wyatt's cafeterias, Wyatt stock dropped in value from $84.00 per share on August 5, 1988, to $.48 per share on May 7, 1993. Petition at 7-9. By 1995, Wyatt stock was worthless, leaving the ESOP with no assets, and on December 31, 1995, the ESOP was formally terminated Id. at 2.

On August 9, 1996, Brown filed this suit in the 14th Judicial District Court of Dallas County, Texas. Brown alleges that the defendants disseminated information which misrepresented the characteristics of the ESOP, thereby fraudulently inducing her to remain in the employ of Wyatt without making alternative plans for retirement distributions. Petition at 9-10. As relief, Brown seeks the creation of a $428 million common fund to benefit herself and members of the class. Id. at 12.

Upon removal of the case to this court on September 17, 1996, Brown promptly filed the instant motion in which she contends that removal was improper because (1) the defendants'

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[1] Brown brings this action individually and on behalf of (1) employees of Wyatt and its related corporations, and (2) beneficiaries of the ESOP with active or vested accounts which did not lapse between January 1, 1988, and January 1,1996.Petition at 1.

notice of removal was defective, (2) the defendants voluntarily submitted to the jurisdiction of the state court, and (3) there are no federal claims and diversity of citizenship is lacking.

II. ANALYSIS

A. Was the Notice of Removal Defective?

Brown argues that the notice of removal was defective because, contrary to 28 U.S.C. § 1446(a),[2] it did not contain (1) a copy of a letter from her counsel to the defendants' counsel, or (2) a copy of Litzler's service of process. Because the letter is not a process, a pleading, or an order, however, it was not required, by the terms of § 1446(a), to be filed with the notice of removal. Moreover, although the citation served on Litzler was not originally included, the defendants later supplemented their notice of removal with a copy of that process. *See* Defendants' Supplement to Notice of Removal. Supplementation is allowed to cure defects in a notice of removal. See *Covington v. Indemnity Insurance Company of North America,* 251 F.2d 930, 933 (5th Cir.), *cert. denied,* 357 U.S. 921 (1958). This ground for remand must therefore be rejected.

B. Did the Defendants Voluntarily Submit to the Jurisdiction of the State Court?

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[2] 28 U.S.C. § 1446(a) provides in pertinent part:

> (a)A defendant or defendants desiring to remove any civil action ... from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal . . ., together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

Brown contends that the defendants submitted to the jurisdiction of the state court when they requested an extension of time to file their answer in that court. Plaintiff's Brief in Support of Motion ("Plaintiff's Brief") to Remand at 2. In this circuit, "[a] waiver of the right of removal must be clear and unequivocal." *Beighley v. Federal Deposit Insurance Corporation,* 868 F.2d 776, 782 (5th Cir. 1989). Because Brown has failed to show that the defendants in this case clearly waived their right to removal, the court cannot conclude that defendants have submitted to state court jurisdiction. Cf. *Warner v. Crum & Forster Commercial Insurance Company,* 839 F. Supp. 436, 439 (N.D.Tex. 1993) (defendant did not waive its right of removal merely by filing an answer and a motion to transfer venue before filing a notice of removal).

C. Does ERISA Preempt Brown's Claims?

Brown asserts that the defendants cannot remove this action to federal court because she has chosen to proceed solely on claims grounded in state law, Plaintiffs Brief at 3, while the defendants argue that the Employee Retirement Income Security Act, 29 U.S.C. §§ 100 1 *et seq.* ("ERISA"),[3] pre-empts Brown's state claim and provides the basis for removal. Under the well-pleaded complaint rule, a case is not removable where the complaint asserts only state law causes of action. *Kramer v. Smith Barney,* 80 F.3d 1080, 1082 (5th Cir. 1996) (citing *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 10 (1983)). The pre-emption doctrine, however, carves out an exception to this rule: "Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is necessarily federal in character." *Metropolitan Life Insurance Company v. Taylor,* 481 U.S. 58, 63-64 (1987). Such statutory pre-emption "converts an ordinary state common law complaint into one stating a federal claim for purposes of the wellpleaded complaint rule." Id. at 65.

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[3] The ESOP was established under the guidelines of ERISA. *See* Summary Plan Description: Employees' Stock Ownership Trust Agreement.

Congressional intent determines whether a federal statute pre-empts a state cause of action. *FMC Corporation v. Holliday,* 498 U.S. 52, 56 (1990). Any inquiry into such intent necessarily includes an examination of the statutory language and the structure and purpose of the statute taken in its entirety. Id. at 57. ERISA contains a pre-emption clause providing, in relevant part:

> Except as provided in subsection (b)[4] of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title.

29 U.S.C. § 1144(a).

It is well settled that § 1144(a) is deliberately broad and expansive in its language and application. *Corcoran v. United Healthcare, Inc.,* 965 F.2d 1321, 1328 (5th Cir.), *cert. denied,* 506 U.S. 1033 (1992). State causes of action are barred under § 1144(a) if

> (1) the state law claim addresses an area of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claim directly affects the relationship between the traditional ERISA entities-- the employer, the plan and its fiduciaries, and the participants and beneficiaries.

Hubbard v. Blue Cross & Blue Shield Association, 42 F.3d *942,* 945 (5th Cir.), *cert. denied,* 515 U.S. *1122* (1995).

Brown's fraudulent inducement claim addresses an area of exclusive federal concern. Brown alleges that the defendants fraudulently induced her to remain an employee of Wyatt through the dissemination of information which misrepresented that (1) the ESOP shares were "valuable property" belonging to her, as an "owner" of Wyatt, *(2)* the "valuable property" increases in value were for her benefit and enrichment as retirement distributions, with stock values increasing to $50.00 and $60.00 and $150.00 per share,

---

[4] 29 U.S.C. § 1144(b) exempts certain state laws from pre-emption, but none of those exemptions is applicable here.

(3) Wyatt overcomes temporary adverse factors, explaining that its $.48 per share valuation was a substantial improvement over the immediately preceding book values, and (4) Wyatt would be in business 48 years from now. Petition at 5. These allegations require the court to examine and interpret the language of the instruments creating this ERISA-governed ESOP, the operation of the ESOP, and any communications made by the defendants to Brown concerning the terms of the ESOP.

The Fifth Circuit has reached the same conclusion in similar cases. For example, in *Christopher v. Mobil Oil Corporation,* 950 F.2d 1209 (5th Cir.), *cert. denied,* 506 U.S. 820 (1992), the plaintiff alleged that the defendants misrepresented the terms of an ERISA-governed employee benefit plan to induce the plaintiff to quit. Id. at 1217. The court held, however, that such a fraudulent inducement claim addressed an area of exclusive federal concern because consideration of the claim required the court to consider the language of the plan, operation of the plan, and communication about the terms of the plan. Id. at 1218.

Likewise in *Hubbard v. Blue Cross,* above, the plaintiff asserted that the defendant plan insurer induced the plaintiff to remain with an ERISA-regulated health benefits plan by withholding "secret guidelines" as to when benefits would be granted. *Hubbard,* 42 F.3d at 944. The court found that the fraudulent inducement claim addressed an area of exclusive federal concern since its resolution required an inquiry into the existence of the guidelines, whether the guidelines were used in the plaintiffs case, and whether the guidelines materially affected the determination of non-coverage in the plaintiffs medical treatment. Id. at 946.

In addition, Brown's fraudulent inducement claim directly affects the relationship between traditional ERISA entities. Brown, a beneficiary of the ESOP, asserts her claim against the defendants, who were fiduciaries of the ESOP. Accordingly, Brown's claim is pre-empted under § 1144(a).[5]

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[5] Brown also makes two unmeritorious arguments apart (continued...)

III. CONCLUSION

The defendants' notice of removal is not defective, the defendants have not submitted to state court jurisdiction, and removal is proper based on ERISA preemption of Brown's fraudulent inducement claim. Accordingly, Brown's motion to remand is DENIED.

SO ORDERED.

September 11, 1997.

S/ A. Joe Fish
A. JOE FISH
United States District Judge

(...continued)
from § 1144(a). First, Brown urges that pre-emption would leave her with no adequate remedy for the defendants' fraud. *See* Plaintiff's Reply to Defendants' Surreply at 1-3. However, § 1144(a) bars state law causes of action even though such pre-emption may leave a victim of fraud or misrepresentation without a remedy. *Hansen v. Continental Insurance Company,* 940 F.2d 971, 979 (5th Cir. 199 1) (citing *Lee v. E.I. DuPont de Nemours,* 894 F.2d 755, 757 (5th Cir. 1990)).

Brown also asserts that the Department of Labor's failure to take action upon her complaint filed with that department creates an inference that her claim is not pre-empted by ERISA. She argues that such an inference is warranted because, if her claim were pre-empted by ERISA, the department would have taken action on the complaint. Motion to Remand at 4; Plaintiff's Brief at 3-4. In fact, the Department of Labor wrote to Brown, in what appears to be a form letter, explaining that it was not pursuing her claim because of the limited resources of the department, not because of any issue of ERISA pre-emption. *See* U.S. Department of Labor Letter, Exhibit C to Plaintiff's Motion to Remand.

APPENDIX H.

STATUTORY PERTINENT TEXT - TITLE 28 U.S.C.

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a notice of removal signed pursuant to Rule 11 of the Federal Rules of Civil Procedure and containing a short and plain statement of the grounds for removal, together with a copy of all process, pleadings, and orders served upon such defendant or defendants in such action.

* * *

APPENDIX I.

STATUTORY PERTINENT TEXT - TITLE 29 U.S.C. (ERISA)

§ 1002. Definitions (ERISA §3)

For purposes of this subchapter:

* * *

(2)(A). . . the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program -

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

§ 1003. Coverage (ERISA §4)

(a) . . . this subchapter shall apply to any employee benefit plan if it is established or maintained-

(1) by any employer engaged in commerce or in any industry or activity affecting commerce;

* * *

§ 1104. Fiduciary duties (ERISA §404)

(a) Prudent man standard of care

(1) . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

* * *

§ 1109. Liability for breach of fiduciary duty (ERISA §409)

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed

upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. . . .

* * *

§ 1132. Civil enforcement (ERISA §502)

(a) Persons empowered to bring a civil action

A civil action may be brought -

* * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

* * *

(d)(1) An employee benefit plan may sue or be sued under this chapter as an entity. Service . . . upon a trustee . . . shall constitute service upon the employee benefit plan . . . .

* * *

§ 1144. Other laws (ERISA §514)

(a) Supersedure; effective date

. . . the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Supreme Court
FILED
APR 26 1999
CLERK

No. 98-1372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

REBECCA J. BROWN, ON BEHALF OF HERSELF AND ALL OTHER PERSONS SIMILARLY SITUATED,
Petitioner,

v.

NATIONSBANK OF GEORGIA, N.A., and JOHN LITZLER,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT NATIONSBANK OF GEORGIA, N.A. IN OPPOSITION

JEFFREY S. SUTTON
Counsel Of Record
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

STANLEY WEINER
JONES, DAY, REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas, 75201
(214) 220-3939

Counsel for Respondent

PARTIES TO THE PROCEEDINGS

Respondent NationsBank of Georgia, N.A. changed its name to NationsBank N.A. South in December 1995 and merged into NationsBank N.A. in June 1997. NationsBank N.A. is a wholly-owned subsidiary of N.B. Holdings Corporation which in turn is a wholly owned subsidiary of Bank America Corporation. NationsBank N.A. has no nonwholly-owned subsidiaries.

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STATEMENT

Plaintiff seeks review of an unpublished, per curiam decision of the Fifth Circuit, which found that her claims for money damages against trustees of an employee stock plan were defective as a matter of law under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq*. Each of the court of appeals' fact-bound decisions, resting on settled legal principles previously accepted by this Court, does not warrant further review. Plaintiff's claims in some instances are foreclosed by the terms of ERISA, in other instances attempt to overrule existing precedent from this Court, and in one instance was not even raised below. And while plaintiff today claims that the questions presented are of national import, she apparently did not feel that way at the Fifth Circuit. There, she agreed to waive oral argument. Surely it is the rare claimant that can successively persuade a court of appeals not to hold oral argument in an action, then convince this Court to grant review of the same issues. This petition, we respectfully submit, does not meet that steep challenge.

A. Facts

Petitioner Rebecca Brown was an employee of Wyatt Cafeterias, Inc., a company that operated food services in the Southwest, for 17 years. From January 1, 1988 to January 1, 1996, Brown was a beneficiary of the Wyatt Cafeteria Employee Stock Ownership Plan (the "employee stock plan" or "plan").

The employee stock plan was established in accordance with the general requirements of ERISA, 29 U.S.C. § 1001 *et seq.*, and with the specific requirements of an "employee pension benefit plan" under ERISA, 29 U.S.C. § 1002(2). Wyatt Cafeterias sponsored the plan, which held stock in the company for the benefit of Brown and other employees. Because the plan was non-contributory in nature, Wyatt employees could not make contributions to it. The company instead made all

contributions to the plan, and employees were allocated Wyatt stock based on the size of the company's contributions and based on the size of the employees' relative salaries. A summary description of the plan alerted employees that because "the primary purpose of [the plan] is to purchase Wyatt Cafeterias' stock, gains and losses in your account will primarily be caused by fluctuations in the value of Wyatt stock."

Respondent NationsBank of Georgia, N.A. served as a trustee of the employee stock plan during part of the plan's eight-year existence. And so did its successor trustee, respondent John Litzler. Under the terms of the plan, the trustees were ERISA fiduciaries. *See* 29 U.S.C. § 1102(a)(2).

In the years following the creation of the Wyatt employee stock plan, the company's stock dropped markedly in value. By 1995, the stock had become worthless, leaving the plan with no assets. On December 31, 1995, in accordance with a Chapter 11 plan of reorganization commenced by Wyatt's successor, the plan was formally terminated. No termination distributions were made from the plan because by that time the company's stock had no value.

B. Procedural History

On August 9, 1996, plaintiff filed an action on behalf of herself and other beneficiaries of the plan. She alleged that the trustees had committed common law fraud and breached their fiduciary duties as trustees of the employee stock plan, by among other things causing her to remain a Wyatt employee without making alternative retirement plans. Appendix to Petition for Writ of Certiorari ("Pet. App.") 16a. Initially filed in Texas state court, the action was later removed to federal court because plaintiff sought money damages for actions of the trustees in their capacities as ERISA fiduciaries.

On October 22, 1996, the trustees filed a motion to dismiss or in the alternative for summary judgment on the grounds that plaintiff's common law fraud claim was preempted by ERISA. The district court (Fish, J.) granted the motion. Even accepting plaintiff's allegations as true, the court held that they would not entitle her to compensatory or punitive damages under ERISA because "[a] private litigant may not recover individual compensatory or punitive damages under § 1132(a)(2). Rather, the individual claimant must recover on behalf of the plan," not on behalf of herself. Pet. App. 16a (citations omitted). Accordingly, the court dismissed plaintiff's claims for compensatory and punitive damages as a matter of law.

At the same time, the district court recognized that ERISA permitted awards to individuals of "appropriate equitable relief" in limited circumstances. Pet. App. 16a (citing 29 U.S.C. § 1132(a)(3)). The court therefore reserved final decision on the trustees' dispositive motion and directed the parties to submit further briefs on the question whether Brown was eligible for equitable relief on her own behalf if she established that the trustees breached their fiduciary duties under ERISA. Pet. App. 3a, 17a. The trustees promptly filed a second brief, contending that the equitable claims also should be dismissed as a matter of law. Instead of responding to this brief and following the court's directive, plaintiff filed a motion for leave to amend her complaint, and before the court could rule on her motion she proceeded to file the amended complaint. Pet. App. 3a. After the deadline to respond to the trustees' brief had passed and after plaintiff had "chosen not to avail herself of the opportunity to respond" (Pet. App. 9a), the district court granted the trustees' motion for summary judgment.

In an unpublished opinion, the court concluded that plaintiff's claim, even accounting for the amended complaint, did not establish a cognizable basis for equitable relief under

ERISA. Pet. App. 10a. Noting that plaintiff had merely "recast[ ]" her legal claims for money damages into equitable-sounding claims for money damages, the court found that the amended claim was simply "an awkward and futile attempt to cloak an obvious claim for damages in the language of equity." *Id.* By whatever name, the court reasoned, plaintiff's request for "mandatory injunctive relief to enjoin Defendants to make good the value of the [employee stock plan]" is still "a claim at law." *Id.* In the alternative, the court concluded that "even if Brown's request for a constructive trust stated a claim in equity," she had "failed to provide evidence of a fact issue regarding unjust enrichment, an essential element of the claim." Pet. App. 10a-11a.

On October 6, 1998, the Fifth Circuit (Davis, Duhe, Parker) affirmed in a per curiam, unpublished opinion. The court of appeals did not hear oral argument in the case, and plaintiff specifically stated in her appellate brief "that the decisional process would not be significantly aided by oral argument." Brief for Appellant Rebecca J. Brown, at iii. The appellate court first agreed with the district court that plaintiff had "simply tried to re-characterize an obvious claim for damages in the language of equity," and therefore could not evade the ERISA restrictions against legal relief on that ground alone. Pet. App. 4a. The court next concluded that legal damages were not available on plaintiff's claim, both because there was "no longer a plan for which Brown would be able to recover 'on behalf of,' under ERISA § 409(a)" (*id.*), and because at any rate "monetary damages" are "not available under ERISA § 502(a)'s carefully crafted civil enforcement provisions"(*id.*). Lastly the court rejected plaintiff's contention that she was improperly denied an opportunity to amend her complaint. In the court of appeals' view, the lower court did in fact consider — and reject — plaintiff's amended claims, so that "it would serve no valid purpose to allow Brown another attempt in vain

to further cloak her original damages claims in the language of equity." Pet. App. 5a.

REASONS FOR DENYING THE WRIT

In her petition, plaintiff raises three questions. The first two are related and challenge the Fifth Circuit's conclusion that the absence of an ERISA plan prevented plaintiff from bringing a claim as a beneficiary "on behalf of" a plan, ultimately contending that the case should never have been removed from State to federal court. Plaintiff next argues that the Fifth Circuit erred in alternatively concluding that she could not obtain monetary damages under ERISA's civil enforcement provisions.

In attacking these components of the lower court decision, plaintiff attempts to address each of the customary explanations for granting the writ under Rule 10, but in the end falls well short of satisfying a single one of them. The decision represents an application of well-settled law to the unique facts of this case, and fails either to implicate a conflict of authority in the lower courts or to raise an issue of law that has been decided differently by this Court. The petition should be denied.

A. Plaintiff Has Waived Her Challenge To The Removal Order, And At Any Rate The Order Does Not Conflict With Precedent From This Court Or The Lower Courts.

Plaintiff starts (Pet. 5-6) by arguing that the district court erred in removing the case to federal court when there was no longer an existing ERISA plan, then suggests that the removal decision somehow conflicts with other lower-court decisions. Neither claim is correct, and each fails to justify further review of this decision.

In the first place, there is no court of appeals decision to review on this point. Plaintiff never raised any such argument at the Fifth Circuit and accordingly the court never had any reason to consider it. The argument, in short, has been waived and for that reason alone does not warrant further review.

In the second place, the argument misapprehends established law. Principally relying on two cases from the Eleventh Circuit, *see Whitt v. Sherman Int'l Corp.*, 147 F.3d 1325 (11th Cir. 1998), and *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (*en banc*), plaintiff suggests (Pet. 5-6) that because there was no "existing plan" under ERISA at the time of removal, the federal court lacked jurisdiction to review her claims. The cited cases, however, address the very different situation in which claims were raised *before* an ERISA plan was ever established. In that setting, precedent properly forecloses jurisdiction for this sensible reason: As "no ERISA plan existed at the time of removal" and none had yet been formed, it is inappropriate to use a "subsequently adopted ERISA plan" to establish jurisdiction retroactively. *Whitt*, 147 F.3d at 1333. *See also Dillingham*, 688 F.2d at 1373, 1375 (finding that jurisdiction existed because the plan was not a prospect, but "a reality," at the time of removal). Yet that problem, and these cases, do not govern jurisdictional claims raised *after* an ERISA plan has been terminated and do not address claims that seek to assess liability for actions that occurred during the existence of the plan. The latter situation is of course the one presented here, and simply is not controlled by these correctly reasoned, yet inapposite, decisions.

Nor does plaintiff advance her cause by briefly citing (Pet. 6) two other cases ostensibly for this point. The Seventh Circuit's decision in *UIU Severance Pay Trust Fund v. Local Union No. 18-U*, 998 F.2d 509, 510 (7th Cir. 1993), is not even remotely connected to this issue. It dealt with a claim for restitution, and said nothing at all about jurisdiction or the need

for a plan. And the district court's unpublished decision in *Bongiorno v. Associates in Adolescent Psychiatry, S.C.*, No. 93 C 2740, 1993 U.S. Dist. LEXIS 11262 (N.D. Ill. Aug. 12, 1993), is equally inapt. As a later decision by the same court in the same case confirms, this matter also concerned a claim that a plan "either never went into effect or was terminated shortly after it went into effect." *See Bongiorno v. Associates in Adolescent Psychiatry, S.C.*, No. 93 C 2740, 1994 U.S. Dist. LEXIS 18446, at *10 (N.D. Ill. Dec. 15, 1994). In the final analysis, plaintiff has not shown one district court, to say nothing of a circuit court, that would decide the removal issue differently from the Fifth Circuit, even if the lower courts had in fact been presented with the issue.

B. No Conflict Of Authority Exists.

Plaintiff next attempts (Pet. 6-9) to manufacture a conflict of authority regarding the issues the Fifth Circuit did decide, namely that relief must be denied (1) because plaintiff no longer was a beneficiary of an existing plan at the time her claim was brought and (2) because monetary damages at any rate are not available for a claim on behalf of an individual as opposed to a plan. The cases on which plaintiff relies do not live up to their billing, and in the end no conflict emerges.

To start with, none of the cited cases discusses these general issues, and none addresses the unusual claim raised here—that plaintiff deserves (Pet. 9) "monetary damages, monetary equitable relief or monetary remedial relief" because the trustees of the stock employee plan somehow caused her to remain a Wyatt employee without making alternative retirement plans. Several of the cases, for example, merely involve beneficiaries of a failed plan who brought claims, though neither the courts nor the parties addressed whether the claims had to be brought on behalf of an existing plan. *See, e.g., Roth v. Sawyer-Cleator Lumber Co.*, 61 F.3d 599, 605 (8th Cir.

1995) (holding that decline in value of company stock held by an ERISA plan was "a loss to the Plan under ERISA 409(a)"); *Mertens v. Black*, 948 F.2d 1105, 1106 (9th Cir. 1991) (holding that decision concerning prior action on behalf of plan did not establish issue or claim preclusion regarding later action on behalf of plan) (per curiam). *Roth*, in point of fact, confirms the propriety of the legal framework that the Fifth Circuit applied. As here, *Roth* agreed that relief under section 409(a) was appropriate only when the plaintiff could show that the "loss is 'to the plan,'" as opposed "merely to the beneficiaries." 61 F.3d at 602.

Other cases simply establish the standard of care a fiduciary owes a plan, *see Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1404 (9th Cir. 1995), or more generally concern the rules regarding ERISA preemption, *see California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316 (1997). They thus do not remotely address the issues contested before the Fifth Circuit.

Still another case, *Kayes v. Pacific Lumber Co.*, 51 F.3d 1449 (9th Cir.), *cert. denied*, 516 U.S. 914 (1995), confirms the validity of the Fifth Circuit's decision rather than undermining it. As a general rule, *Kayes* indicates, individuals in plaintiff's position cannot "sue on behalf of [a] terminated plan." *Id.* at 1454. The decision, to be sure, does proceed to acknowledge that by statutory amendment, *see* 29 U.S.C. § 1132(a)(9), a different rule applies to former beneficiaries who claim a fiduciary breach has occurred in the narrow confines of a purchase of insurance contracts in connection with their termination as plan participants. *See id.* at 51 F.3d at 1455. That principle, however, has no application here.

And one case is mentioned not for the majority decision, but for a concurring and dissenting opinion. *See Fink v. National Savings and Trust Co.*, 772 F.2d 951, 961 (D.C. Cir. 1985)

(Scalia, J., concurring in part and dissenting in part). Even this separate writing, however, goes only to an application of law, not to a new legal principle.

Nor, lastly, does *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), help plaintiff. It again proves the rule on which the Fifth Circuit relied, and indeed was addressed by the court of appeals. In accordance with the plain language of section 409(a) of ERISA, 29 U.S.C. § 1109(a), *Russell* held that extra-contractual or punitive damages are not available to a beneficiary of an ERISA plan. A similar conclusion applies here.

In the end, plaintiff has failed to identify one case, from this Court or any other, under which her claims would have been decided differently. Contrary to her suggestion, then, the petition simply does not implicate a split in the lower courts.

C. The Decision Is Correct On The Merits.

Unable to establish a division in the lower courts, plaintiff next attempts to argue (Pet. 9-11) that the decision should nonetheless be reviewed because it was wrongly decided. This, too, is mistaken.

Plaintiff filed this claim under section 409(a) of ERISA, 29 U.S.C. § 1109(a). The carefully-crafted provision sets forth a comprehensive civil enforcement scheme that balances the need for fair claims procedures against the public interest in encouraging the formation of employee benefit plans. Under the provision, trustees of an ERISA plan who breach their fiduciary duties:

> [1] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, [2] and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and [3] shall be subject to such other equitable or

> remedial relief as the court may deem appropriate, including removal of such fiduciary.

Plaintiff's claim for money damages simply does not fit within any of these three exclusive categories.

In contending that the trustees caused her to remain a Wyatt employee without making alternative retirement plans (Pet. App. 16a), plaintiff clearly is not making a claim for "losses to the plan," making a claim "to restore" any profits "to such plan," or in any other way making a claim on behalf of the plan. By its terms, the claim is one for money damages brought on plaintiff's behalf, and thus is not a claim recognized by the statute. Both the district court and the Fifth Circuit thus correctly recognized that individual claimants cannot advance claims for fiduciary breach on behalf of themselves, but only on behalf of the plan. That conclusion is compelled by the terms of the statute, *see* 29 U.S.C. § 1109(a), and by precedent from this Court. *See, e.g.*, *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. at 144.

Nor can plaintiff end-run this restriction by recharacterizing her claim as one for equitable relief. As she candidly admits (Pet. 9), she still wants monetary relief, whether in her words you call it "monetary damages, monetary equitable relief or monetary remedial relief." This Court, most notably, has previously rejected the suggestion that section 409(a)'s provision for equitable relief can be contorted to allow for money damages, a point duly noted by the Fifth Circuit in its decision below. *See* Pet. App. 4a ("'Equitable relief' under ERISA includes 'those categories of relief which were typically available in equity (such as injunction, mandamus, and restitution, but not compensatory damages'") (quoting *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993)). The Fifth Circuit, like the district court before it, properly rejected this claim as a matter of law.

D. The Lower-Court Decision Represents An Application Of Settled Law And Does Not Raise Questions Of National Importance.

Even aside from the absence of disagreement on the issues presented and even aside from the soundness of the Fifth Circuit's decision, the petition should be denied for still another reason. The case simply does not raise the kinds of pressing national issues that customarily warrant the Court's attention. From beginning to end, the petition represents at most a challenge to the application of several settled legal principles.

In trying to argue to the contrary, plaintiff contends (Pet. 11) that the case warrants the Court's attention due to "the proliferation of business mergers and acquisitions, and attendant business failures" causing "hundreds of thousands of employees" to be "subject to dislocation." No doubt these are important concerns. But they have little to do with this case, and in point of fact offer little reason why *every* ERISA case, as opposed to this one in particular, should not warrant review.

Nor does plaintiff improve her position by contending (Pet. 12) that the Court's ERISA "decisions have not been as effective and definitive as the Court could have wanted them to be." That aggressive suggestion, however, counsels against freely granting review in this area, not in favor of accepting such review, for it confirms the wisdom of reviewing only those ERISA issues that have had ample time to percolate in the lower courts. This simply is not one of those issues.

Plaintiff next suggests (Pet. 12-13) that the case is important because the Court has failed to appreciate that the "[c]ongressional intent" of ERISA "was for exclusive federal *regulation* of employee benefit plans, so that only state laws *regulating* employee benefit plans are to be preempted." Again, however, in arguing that ERISA should not preempt State law fraud claims like those preempted here, plaintiff is to

be sure technically raising an important federal question. But, again, it does not warrant review. Plaintiff's attack on the Court's construction of the "relating to" language of ERISA preemption was not raised below, was not addressed by the Fifth Circuit, and thus has now been waived. Accordingly, the issue could not even be addressed by the Court in the event the petition were granted. Indeed, in the petition for rehearing, plaintiff directly distinguished a case relied upon by the Fifth Circuit in these words: That "decision is about ERISA preemption, which has not been an issue in this appeal." Petition for Rehearing of Appellant Rebecca J. Brown, at 5. Perhaps most importantly, this broad claim is broadly undermined by existing Court precedent. *See California Division of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 334; *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125, 129 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

Ultimately, plaintiff's core disagreement with the Fifth Circuit goes not to a dispute over legal principles but to a dispute over the correct application of the law to the unique facts presented by this record. But that dispute falls well short of meeting Rule 10's bookend warnings that a petition is "rarely granted" when the alleged error consists of (1) "erroneous factual findings" or (2) "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. This unexceptional decision, we respectfully submit, simply is not one of those "rare" cases.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JEFFREY S. SUTTON
Counsel Of Record
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

STANLEY WEINER
JONES, DAY, REAVIS & POGUE
2300 Trammell Crow Center
2001 Ross Avenue
Dallas, Texas, 75201
(214) 220-3939

Counsel for Respondent

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No. 98-1372

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself
and All Other Persons Similarly Situated,
Petitioner,

v.

NATIONSBANK OF GEORGIA, N.A.
and JOHN LITZLER,
Respondents.

On Petition For Writ Of Certiorari To The
United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

Thomas Telford Barnhouse
Counsel of Record for Petitioner
Law Offices of Thomas T.Barnhouse
275 West Campbell Road, Suite 201
Richardson, Texas 75080-3560
(972)231-0472 - Fax (972)231-4286

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No. 98-1372

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

REBECCA J. BROWN, On Behalf of Herself and All Other Persons Similarly Situated, *Petitioner,*

v.

NATIONSBANK OF GEORGIA, N.A. and JOHN LITZLER, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY BRIEF TO BRIEF IN OPPOSITION

In its brief in opposition, respondent NationsBank of Georgia, N.A. addresses the Questions Presented by grossly distorting the following facts and law in this case:

PETITIONER'S FACTS ARE NOT AT ISSUE

In plain language, there was no ERISA plan at the time of removal of this case to federal court. The review of this case should be based on Petitioner's Statement of Facts Material to Questions Presented. [Pet. 2] The averments of facts stated in Petitioner's Original Petition in state court and First Amended Complaint--Class Action in federal court are not at issue. These facts have not been denied by the respondents, who had the opportunity to answer, but did not file an answer as a responsive pleading. Under Rule 8(d) of the Federal Rules of Civil Procedure, averments in a pleading to which a responsive pleading is required are admitted when not

denied in the responsive pleading.

LAW OF JURISDICTIONAL ISSUES

In plain language, erroneous federal jurisdiction can never be waived. The Questions Presented are from lower court decisions 1)denying remand to state court, 2)denying ERISA relief, and 3)denying existence of an ERISA plan.

Subsidiary questions "fairly included" in the Questions Presented are 1)Whether the "relate to" tests for ERISA preemption can require denial of remand to state court without a covered plan? and 2)Whether ERISA preemption requires that ERISA relief be available?

The Questions Presented, and subsidiary questions fairly included, go directly to the issues of federal jurisdiction. Determining federal jurisdiction in the lower courts is a primary supervisory function of the Court. The prime responsibility for the Court is for the proper functioning of the federal judiciary, and the grant of certiorari in cases involving jurisdiction is part of that responsibility. For that reason alone the petition for writ of certiorari in this case should be granted. Such cases certainly qualify for review by reason of conflicts of decisions as exist in this case.

Whether or not raised below, jurisdictional issues are always considered for review, even *sua sponte*. See *United States v. Storer Broadcasting Co.*, 351 U.S. 193, 197 (1956). See also *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908); (". . . it is the duty of this [C]ourt to see to it that the jurisdiction of the [court of appeals and district court], which is defined and limited by statute, is not exceeded").

Interestingly, the court of appeals decision relied on a case citation about a jurisdictional issue regarding the "relate to" tests for preemption of state law, in *Sanson v. General Motors*, 966 F.2d 618 (11th Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). Even more interesting, the dissenting opinion in *Sanson* by Judge Birch, at 623, uses the "sensible person" approach described below in finding no preemption because the state law creating Sanson's cause of action is not in a field of law with a judicially created specific remedy that

explicitly encompasses pension plans.

LAW OF ERISA-GOVERNED PLANS

The "relate to" tests for preemption of state law can only be applied to ERISA-governed plans that are ERISA covered plans. In *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992), Justice Thomas delivered the opinion of the Court by stating first there must be a covered plan under ERISA §4(a) Coverage, 29 U.S.C. §1003(a) [Pet. App. 26a], before the "relate to" tests for preemption of state law can be applied, at 127. See also:

a. *Meredith v. Time Ins. Co.*, 980 F. 2d 352 (5th Cir. 1993); ("ERISA preemption is based on the existence vel non of an employee benefit plan, and that an employee benefit plan necessarily must center in the existence of an employer and an employee," at 354--Emphasis added).

b. *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995); (if the plaintiff is not a participant [Brown was not a participant at time of removal], beneficiary or fiduciary, then [her] state law claims fall outside ERISA's sphere and are not subject to preemption, at 1505).

c. *Slamen v. Paul Revere Life Ins. Co.*, No. 98-6147 (11th Cir. Feb.1, 1999) <http://www.law.emory.edu/11circuit/feb99/98-6147.opn.html> ("because the plan is not governed by ERISA" the state law claims "did not arise under ERISA and the district court was without jurisdiction," at 4).

d. *Cypress Fairbanks Medical Center, Inc. v. Pan-American Life Ins. Co.*, No. 96-20850 (5th Cir. Apr. 17, 1999) <http://www.ca5.uscourts.gov/opinions/pub/96/96-20850-cv0.htm> (state law action, arising "precisely because there is no ERISA plan coverage," remanded to Texas state court, at 3--Emphasis added).

LAW OF THE FIRST AMENDED COMPLAINT

Nonetheless, once the district court accepts jurisdiction under ERISA preemption whether or not there is a covered plan, it is difficult to challenge that jurisdiction on appeal, in an interlocutory proceeding or otherwise, particularly when the district

court has focused on availability of equitable relief under ERISA and has not entered a final judgment on whether relief is available for a fiduciary breach cause of action. See *Concha v. London*, *supra* 3; (an order refusing to remand is, of course, not a final appealable order under 28 U.S.C. §1291, at 1506). Standards for interlocutory appeals under 28 U.S.C. §1292(b) are very exacting.

It was not only Brown's most appropriate course, but it was her required course, that she plead her state law claims under ERISA §502(a) Civil enforcement remedies and relief in her first amended complaint, pursuant to *Christopher v. Mobil Oil Corp.*, 950 F. 2d 1209 (5th Cir. 1992);(claimants should be required to plead preempted state law claims as ERISA claims, at 1223). See also:

a. Vega v. National Life Ins. Services, Inc., 145 F. 3d 673 (5th Cir. 1998); (motion to amend complaint to assert state law claims under ERISA implicitly granted by denying motion to remand, at Note 13).

b. *Slamen v. Paul Revere Life Ins. Co.*, *supra* 3; (district court "dismissed [plaintiff's] state law claims as preempted by ERISA, allowing [plaintiff] leave to amend for purpose of stating an ERISA claim," at 2--Emphasis added).

LAW OF FIELD PREEMPTION

However, Justice Scalia and Justice Ginsburg have noted most recently in *California Division of Labor Standards Enforcement et al. v. Dillingham Construction, N.A., Inc., et al.*, 519 U.S. 316 (1997), that the "relate to" tests for preemption set out in earlier decisions of the Court now simply appear to be wrong, at 334. The Justices suggest looking for the "sensible person" approach, where "relate to" is not a test for preemption, but rather should be used to identify ordinary field preemption, that is, the field of laws regulating "employee benefit plans" covered under ERISA §4(a) Coverage, 29 U.S.C. §1003(a). [Pet. App. 26a]

See also the similar conclusion in the dissent by Justice Stevens in *District of Columbia v. Greater Washington Bd. of Trade*, *supra* 3, at 136 ; (ERISA supersedes state law regulation in the field regulated by ERISA, and when state law at issue does not

regulate even one inch of the preempted field there is no preemption) and *John Hancock Mut. Life Ins. Co. v. Harris Trust and Sav. Bank*, 510 U.S. 86 (1993); ("we discern no solid basis for believing that Congress, when it designed ERISA, intended fundamentally to alter traditional [ordinary field] preemption analysis," at 99).

Fortunately, a few lower courts have expressed the same concerns. These courts can be considered the "sensible person" we should be looking for. They are deciding that the plain statutory language of ordinary preemption in ERISA §514(a), 29 U.S.C. § 1144(a) [Pet. App. 28a] is not sufficient for federal jurisdiction over state law claims seeking remedies or relief not within the scope of ERISA §502(a), 29 U.S.C. 1132(a) Civil enforcement remedies and relief [Pet. App.28a]. For example, see:

a. *Giles v. NYLCare Health Plans,* No, 97-20840 (5th Cir. Apr. 9, 1999) <http://www.ca5.uscourts.gov/opinions/pub/97/97-20840-CV0.HTM> (state law claims were remanded to state court, by deciding that ordinary field preemption under ERISA §514(a), 29 U.S.C. 1144(a) [Pet. App. 28a] is not sufficient for removal, unless state law claims seek the same relief as provided under ERISA §502(a), 29 U.S.C. 1132(a) Civil enforcement remedies and relief [Pet. App.28a], citing *McClelland v. Gronwaldt*, 155 F.3d 507 (5th Cir. 1998), at 3).

b. *Slamen v. Paul Revere Life Ins. Co., supra* 3; (if plaintiff "was not entitled to seek relief under ERISA, 'no federal jurisdiction exists' and the case must be remanded to the state courts," at 2).

c. *FMC Medical Plan v. Owens*,122 F. 3d 1258, 1260, 1262 (9th Cir. 1997); ("If . . .remedy sought [money damages] is not available under ERISA . . .the district court has no subject matter jurisdiction. . ."---remedy should be sought in state court, Note 2).

d. *Gabner v. Metropolitan Life Ins. Co.*, 938 F. Supp. 1295 (E.D. Tex. 1996); (removal to federal court is proper when relief is available under ERISA §502(a), 29 U.S.C. 1132(a) [Pet. App. 28a]).

e. *Constantine v. Minis*, 910 F. Supp. 657 (S.D.Ga. 1995);(there is no ERISA preemption because the state law fiduciary

breach claims do not fall within the scope of ERISA §502, 29 U.S.C. 1132 [Pet. App. 28a] even though the ESOP was a plan subject to ERISA, at 662).

f. *Harris v. Provident Life and Acc. Ins. Co.*, 26 F.3d 930 (9th Cir. 1994); ("it would be contradictory to rule that state law claims are preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA because they are not 'participants' [e.g. Brown] in the ERISA plan," quoting *Deller v. Portland Gen. Elec. Co.*, 734 F.Supp, 916, 918 (D.OR. 1990), and "unlike the Chesire [sic] Cat, one cannot have the smile of preemption without the stripe of participation," quoting *Baird v. CSX Corp.*, 704 F.Supp. 100, 103 (W.D. Va. 1989), 934).

g. *Perry v. P*I*E Nationwide, Inc.*, 872 F. 2d 157 (6th Cir. 1989), *cert. denied*, 493 U.S. 1093 (1990); (state common law fraud in the inducement claims are not preempted because of absence of ERISA remedy, at 162).

LAW OF REMEDY OR RELIEF

Unfortunately, many lower court judicial decisions, as in the case at bar---that conflict with the above decisions---have resulted in no remedy or relief for a valid claim or cause of action. See *Hansen v. Continental Insurance Company*, 940 F. 2d 971, 979 (5th Cir. 1991) (citing *Lee v. E.I. Dupont de Nemours*, 894 F. 2d 755, 757 (5th Cir. 1990)).

***There is no jurisprudence in the world that accepts this kind of injustice*—except** in the many ERISA decisions where so many lower courts admittedly grin like the fabled "Cheshire Cat" in handing down such unjust decisions.

By definition, a "claim" or "cause of action"can not be a "claim" or "cause of action" without an available remedy or relief. See *Random House Legal Dictionary*, 1996, James E. Clapp; ("claim" means assertion of facts that if true would entitle claimant to judgment, p. 42; "cause of action" means facts that if true would entitle a party to relief in a lawsuit, p. 37; "remedy" means a judgment that can be issued by a court in a civil action---before merger of law and equity the conventional terminology was "a

remedy at law" or "relief in equity" but now the terms "remedy" and "relief" are largely interchangeable, p. 227).

The decision of the district court that "Brown's fraudulent inducement claim" is an ERISA "claim" [Pet. App. 24a] would mean to a "sensible person" that there is an ERISA remedy or relief for the claim.

Justice is the business of the Court. See *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931); (it is a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts, at 563). See also *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); ("It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," citing *Construction Workers v. Laburnum Corp.*, 347 U.S. 656, 663-664 (1954), at 251).

Justice can be served under *Caminetti v. United States*, 242 U.S. 470 (1917); ("the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms," at 485). Under plain statutory language, the Court can affirm as a judicial decision, that when there is no remedy or relief under ERISA for a state law claim, the claim is not under ERISA preemption, is not under federal jurisdiction, and is under state law. By this affirmation, the Court would eliminate erroneous federal jurisdiction in the lower courts, and eliminate lower court monstrous distortions, conflicts and injustices regarding available remedies and relief, including:

a. Characterizing equitable relief of restitution as applying only to ill-gotten gain and not to benefits deprived, as in the case at bar. [Pet. App. 10a-11a] But see *Varity Corp. v. Howe*, 516 U. S. 489, 116 S. Ct. 1065 (1996); (affirming restitution of benefits deprived) and *In Re Unisys Corp.*, 57 F. 3d 1255, 1269 (3rd Cir. 1995); (appropriate remedies for individual claims may include restitutionary reimbursement for unpaid benefits).

b. Characterizing, as the lower courts did in the case at bar, that ERISA provides only "appropriate equitable relief" and not monetary relief. [Pet. App.4a] The review of the case at bar

includes ERISA §502(a)(2), 29 U.S.C. §1132(a)(2) [Pet. App.28a], containing, *inter alia*, the words "appropriate relief," to be provided under ERISA §409(a), 29 U.S.C. §1109(a) [Pet. App. 27a] containing, *inter alia*, the words "remedial relief" combining "remedy at law " and "relief in equity." See *Random House Legal Dictionary, supra* 6. This language, then, would include monetary damages, monetary equitable relief and monetary remedial relief.

The monetary aspects of equitable relief have also been recognized in Supreme Court decisions. For example, see the concurring opinion by Justice Brennan in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985); (monetary relief cannot be withheld simply because a beneficiary's remedies under ERISA are denominated "equitable," at Note 10). Monetary relief in *Russell* under ERISA §404(a), §409(a) and §502(a)(2), 29 U.S.C. §1104(a), §1109(a)and §1132(a)(2) [Pet. App. 27a-28a] is confirmed in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); (under *Russell*, fiduciaries are personally liable for damages, at 252).

CONCLUSION

Federal jurisdictional issues are important, and this case is representative of the numerous conflicting and erroneous lower court jurisdictional decisions that never see the appellate review of the Court. The respondent's inability to address the Questions Presented without grossly distorting the facts and law in the case makes the need for review of the action below indisputable, suggesting that summary reversal for remand to state court may be in order.

Respectfully submitted,

Thomas Telford Barnhouse
Counsel of Record for Petitioner
Law Offices of Thomas T. Barnhouse
275 West Campbell Road, Suite 201
Richardson, Texas 75080-3560
(972) 231-0472 - Fax (972) 231-4286